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No. 956

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

315 U.S. 8

J. P. GARDZIELEWSKI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HERMAN S. WALLER,
Counsel for Petitioner.

CAMERON LATTER,
JAMES ELWYN DANIELS,
THADEUS NIEMIRA,
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No.

J. P. GARDZIELEWSKI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of J. P. Gardzielewski respectfully shows to this Honorable Court, the following:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner was indicted in the District Court of the United States, Northern District of Illinois, Eastern Division, (R. 2-4) for the criminal offense of "unlawfully, wilfully and knowingly" aiding and abetting one Nosek, Chairman and member of a Local Selective Service Draft

Board in Chicago, to "ask, accept and receive" a bribe from a registrant under The Selective Service Act, to influence the official action of Nosek with reference to the classification of the registrant (R. 2-4).

Having been found guilty by the jury upon his trial, petitioner was sentenced to be imprisoned in a penitentiary for a term of two years (R. 128).

On appeal to the United States Circuit Court of Appeals, Seventh Circuit, the judgment of the District Court was affirmed by a divided court, Major, Circuit Judge, dissenting from the conclusion reached by the majority of the Court (R. 147, 151).

The petitioner and his co-defendant, Nosek, were tried together in the District Court, a motion for severance on the part of petitioner having been overruled before trial (R. 6-8, 10).

On the trial, over repeated objections by counsel for petitioner, evidence was admitted of statements made by the co-defendant, Nosek, out of the presence of petitioner, of conversations had by the co defendant, Nosek, with the officers who arrested him for the offense, and with others, likewise out of the presence of petitioner, which conversations and statements, petitioner contends, were prejudicial and harmful to him, were hearsay, as to him, and ought not to have been admitted as affecting petitioner. The following are the pages of the Record where these matters are found: (R. 15, 15-16, 44-45, 50-51, 60).

There was no showing made that petitioner ever ratified or confirmed these statements by his co-defendant, nor has the Government so far contended that he did so.

It was the theory of the Government upon the trial, that because petitioner was indicted under Section 550, Title 18, U. S. C., for "aiding and abetting, counseling and procuring" the principal offender, Nosek, in the commission

of the offense of bribery charged in the indictment, the Government had, as against petitioner, the duty and the right, to prove, circumstantially, the commission of the substantive offense by Nosek, and that this proof was applicable on the trial of petitioner, against petitioner, since, in order to prove that petitioner was guilty of aiding and abetting Nosek in the commission of the offense, the Government must prove that Nosek actually committed the offense.

The trial Court permitted petitioner to preserve objection to all of this evidence, as the Government put in its case, and these objections were restated (R. 67) in the form of a motion in writing, tendered at the close of the case for the Government, moving that the evidence in question be excluded from the record, as to petitioner and that the jury be directed to disregard it as to petitioner.

In overruling this motion, and permitting this proof to stand, as against petitioner, the trial Court, (R. 68) stated that the objections thus raised to this proof by counsel for petitioner were "timely raised" and indicated that after mature deliberation, the trial judge felt that the evidence in question was admissible against petitioner, whereupon petitioner's objections thereto were overruled.

The instructions or charge of the trial Court, to the jury were not preserved in the record, but it has been the contention of petitioner, throughout, that the question at issue involves, not, misdirection of the jury, but the erroneous admission of evidence, highly prejudicial to petitioner, in view of the extremely limited incriminating evidence in this record.

The majority of The Circuit Court of Appeals, in the opinion of the Court which affirmed petitioner's conviction (R. 147-151) disposes of this contention of petitioner by presuming, in the absence of record proof to the contrary, that the trial Court correctly instructed the jury "as to

the law relating to its consideration of the evidence of the case" (R. 150). The majority opinion also holds that the trial Court properly overruled petitioner's motions to exclude this evidence from the record since the evidence was admissible to "establish the commission of the crime by Nosek, an essential element in proof of the charge of aiding, abetting, counselling and procuring the commission of the crime" (R. 150.)

The dissenting opinion, (R. 151-154) maintains that the evidence in controversy was inadmissible as against petitioner, that in view of the tenuous character of the testimony relied on by the Government for the conviction of petitioner, its admission in evidence was harmful and prejudicial error, that to presume that the trial Court correctly instructed the jury as to its effect would in the instant situation do "violence to the record," and that even had the trial Court "changed his mind and correctly instructed the jury," such instruction could "only serve to minimize the effect of the objectionable testimony—it could not remove the error of its admission without limitation" (R. 153).

The content and scope of this evidence, its harmful and prejudicial effect upon petitioner and the legal and logical grounds upon which it should have been excluded from the proofs against petitioner, are stated in the Brief, incorporated herein, in support of this petition.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner respectfully suggests that from the record of this cause, it is apparent that the writ of certiorari should issue for the following reasons:

1. The decision of the Circuit Court of Appeals for the Seventh Circuit, in holding that the evidence in question was admissible as against petitioner on the ground that proof of the guilt of the principal offender, Nosek was requisite as part of the case against petitioner, indicted for "aiding and abetting" is in conflict with the holding of the Circuit Court of Appeals for the Ninth Circuit in the case of

Rooney v. *United States*, 203 Fed. 928.

2. The decision of the Circuit Court of Appeals for the Seventh Circuit decides an important question of general law in a way probably untenable and in conflict with the weight of authority.

3. The decision of the Circuit Court of Appeals for the Seventh Circuit decides an important question of federal law, which has not been, but should be, decided by this Court.

4. In its decision in the instant case, the Circuit Court of Appeals for the Seventh Circuit has so far sanctioned a departure, by the District Court of the United States, Northern District of Illinois, Eastern Division, from the accepted and usual course of judicial proceedings as to call for the exercise of the power of supervision vested in this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals, for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "*No.* 7759, *the United States of America, Plaintiff-Appellee* v. *J. P. Gardzielewski, Defendant-Appellant*", and that the said judgment and

order of said Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court.

J. P. GARDZIELEWSKI,
Petitioner.

By HERMAN S. WALLER,
Counsel for Petitioner.

CAMERON LATTER,
JAMES ELWYN DANIELS,
THADEUS NIEMIRA,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No.

J. P. GARDZIELEWSKI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals has not yet been reported. It was rendered on January 16, 1942, in the cause then pending in the Circuit Court of Appeals for the Seventh Circuit, numbered in that Court: "No. 7759", and docketed as "*The United States of America, Plaintiff-Appellee* v. *J. P. Gardzielewski, Defendant-Appellant.*"

The opinion of the Court below, appears in the Transcript of Record filed herein at pages 147-151 thereof.

The dissenting opinion of Major, C. J., is set forth on pages 151-154 of the Transcript of Record.

II.

JURISDICTION.

1. A final judgment was rendered in this cause by The United States Circuit Court of Appeals for the Seventh Circuit, on January 16, 1942, affirming the judgment of the District Court of the United States, Northern District of Illinois, Eastern Division, which latter judgment found and adjudged petitioner to be guilty of an offense against the United States, to-wit: a violation of Section 550, Title 18, United States Code (R. 155).

No petition for rehearing was filed in the Circuit Court of Appeals.

2. Statutory authority for the issuance of the writ of certiorari in this cause is to be found in:

Judicial Code, Section 240, as amended.

Grounds for the issuance of the writ, based upon the record, are set forth in the Petition, under the heading, "Reasons Relied On for the Allowance of the Writ."

III.

STATEMENT OF THE CASE.

Petitioner, in active practice as a physician and surgeon in Chicago for some ten years, (R. 110) was the unpaid examining physician for a Selective Service Draft Board in Chicago, he having been requested to undertake this work at the organization of this Board (R. 110). In this capacity petitioner examined, physically, some six to seven hundred registrants (R. 110), devoting an average of two hours a day to this work (R. 110).

Petitioner, upon his trial, proved by a variety of witnesses, some of whom had known him from childhood, that before the indictment in this case he had uniformly borne a good reputation for honesty and integrity and as a law abiding citizen (R. 109, 110, 1115, 119-120, 121).

The evidence further showed that before his trial, petitioner had for some time been in receipt of an income from his profession ranging from $7,000.00 to $10,000.00 a year (R. 114).

The defendant, Nosek, was a lawyer, practicing in the neighborhood of the Board in question, and acted as Chairman and member of that Board (R. 111). His case was not before the Circuit Court of Appeals, and it may be conceded, for the purpose of this proceeding that there was ample evidence in the record to sustain his conviction, as the Circuit Court of Appeals says in the opinion rendered on petitioner's appeal (R. 1511).

It further appears that Nosek and petitioner were friends of long standing, and that petitioner had referred legal business to Nosek, including matters affecting members of petitioner's family, without any sharing of the fees derived from this business, with petitioner (R. 115).

Aside from the testimony, contended here and in the Court below to be inadmissible, the whole question of the guilt or innocence of petitioner depends upon the respective versions given by petitioner and the complaining witness, Kukovec, of a single transaction occurring during the physical examination of Kukovec, alone, in petitioner's office (R. 14-15) on May 1, 1941.

According to Kukovec, during the course of this examination, petitioner asked Kukovec, in substance, whether it was worth $30.00 to him "to get a deferment" and without waiting for a reply told Kukovec to see Nosek to that end and telephoned Nosek to the effect that he was sending Kukovec to him (R. 15).

Petitioner's version of this transaction is that Kukovec expressed his willingness to enter the army "tomorrow" if he were sure that his mother, who was then confined in an Insane Asylum, would be taken care of and that Kukovec expressed a desire to have the mother released from the institution before his induction in the army (R. 112-113), whereupon petitioner told Kukovec that he would need a lawyer to effect the release of the mother and referred him to Nosek (R. 112-113).

It would serve no useful purpose to detail, at this point, the obvious evasions and self-contradictions indulged in by Kukovec during his testimony. They are apparent from a reading of (R. 19-20, 21-29, 29-30, 31-40).

The opinion of the majority of the Court below which sustained petitioner's conviction describes the testimony of this witness as "inconsistent and evasive at several points," but holds that it was not so self evidently and inherently improbable that it can not be deemed substantial (R. 151).

The Judge of the Circuit Court of Appeals who dissented and favored a reversal of the judgment against petitioner says in the dissenting opinion that he has "serious doubt" whether a jury question was presented on Kukovec's testimony (R. 152).

The only purpose of here referring to the unsatisfactory character of that testimony is, that it constitutes the sole direct evidence in this record against petitioner, that the only other evidence in the record tending to point to petitioner's guilt is the very evidence which petitioner contended in both the District Court and the Circuit Court of Appeals was incompetent and inadmissible against him, consisting as it did of statements in the nature of admissions made by his co-defendant, Nosek, out of his presence, amounting merely to recitals of supposed states of fact, and never in any way ratified or confirmed by petitioner.

In the view of the case adopted by the Circuit Judge who dissented (R. 152-153) an error in the admission of testimony is the more harmful and prejudicial when the admittedly competent evidence upon which the conviction of a defendant is based is of the dubious nature of that relied on by the Government in this case.

The record further discloses that immediately following his examination by petitioner, Kukovec went to Nosek's office, arranged to pay to Nosek a bribe of $35.00 to procure a deferment of induction into the army, communicated with the authorities, returned to Nosek's office the same evening and paid an installment of the bribe, and paid the balance to Nosek the following day, in marked money, which was taken from Nosek's person by officers who entered immediately following the payment (R. 15-19).

It will also be recalled that petitioner (R. 111-112) admitted talking with Kukovec, but denied that he talked with him about a "deferment," maintaining that he discussed the possible release of Kukovec's mother from the asylum; admitted that he referred Kukovec to Nosek (R. 112-113) but denied that he did so regarding a "deferment," contending that his purpose was the innocent one of having Kukovec consult Nosek as a lawyer, with reference to the possibility of securing the release of the mother from the institution (R. 113).

In this state of the record, the trial court, permitted to go to the jury evidence that:

1. Kukovec, out of petitioner's presence, said to Nosek (Immediately on arriving at Nosek's office) "the doctor sent me" (R. 15).

2. Nosek thereupon replied: "Oh, yes, you are Walter Kukovec, you came to see me about a six months' deferment" (R. 15).

3. That Nosek said to Kukovec: "I have helped about fifteen fellows and several of them went ahead

and got drunk—several of them were bragging in saloon on how they fixed the draft" (R. 15-16).

4. That Nosek said to Logue (one of the arresting officers) still out of the presence of petitioner: "Of all the opportunities I have had for big money, to think I would get hooked on a little thing like this" (R. 44).

5. That Nosek admitted to one Dixon,—another arresting officer, that he (Nosek) "knew what this (his arrest) was all about" (R. 50).

6. That Nosek remarked to the arresting officers: "That is what you get for trying to be a good fellow and doing a man a favor" (R. 60).

7. That Nosek repeated the foregoing remarks in substance to another arresting officer, one Dixon (R. 51).

As to the first of these instances of hearsay, counsel for petitioner interposed an objection upon the specific ground that this particularly damaging evidence was not applicable to petitioner, coupling the objection with a request that the jury be instructed to disregard it as to petitioner (R. 15), to which objection the trial Court replied to the effect that the jury would be instructed as to "these conversations" at the conclusion of the evidence. Again, objection was specifically made (R. 16) to another similar hearsay conversation, another similar objection was made (R. 17), and again (R. 18-19) when counsel for petitioner objected to certain of these conversations and quasi-admissions on the part of Nosek, the Court said:

> "As to your objection to the defendant, Gardzielewski, at this time it may be received in evidence. You may renew your objection at the close of the Government's case" (R. 18-19).

Later on upon the trial (R. 46), a similar objection was offered to another item of proof of something said by Nosek, out of the presence of petitioner, whereupon the trial Court said:

> "Overruled. At the conclusion of the Government's case I may hear you again on these objections with reference to these defendants and possibly you will want one instruction to that effect. At this time I will overrule it" (R. 43).

Finally, while one of the arresting officers was testifying concerning these statements of Nosek, it was made apparent that petitioner's objections to this hearsay evidence were being duly preserved of record, the following being the language of Court and counsel at this point:

> "Mr. Latter: If your Honor please, it is understood my objection as to Gardzielewski obtains through the testimony.
>
> The Court: Yes, the objection, as you stated, rather, to the evidence" (R. 51).

Thereafter (R. 125), in accordance with the previous suggestion of the Court, counsel for petitioner filed their written motion, on behalf of petitioner, to strike from the record as to petitioner these conversations had between his co-defendant, Nosek, and other witnesses, out of the presence of petitioner, which motion was duly considered by the trial Court and overruled, in the following language:

> "The Court: I have carefully considered all of the evidence, both last evening and this afternoon, during the noon adjournment and I went over it carefully, and your objection was raised and timely raised while the evidence was going in which gave the Court ample time to give the matter careful consideration; at this time your motion to exclude the evidence is denied" (R. 68).

Specifications of Error.

It is submitted that the Circuit Court of Appeals erred in the following particulars:

1. In holding that it must be presumed, upon this record, that the trial Court properly instructed the jury as to the law applicable to the evidence objected to by petitioner, upon his trial.

2. In holding that the error committed by permitting this evidence to go to the jury, in the course of the trial, without limitation, as applicable to and binding upon petitioner, could be cured by charging or instructing the jury at the close of the trial.

3. In holding that because petitioner was indicted for "aiding and abetting" the principal defendant under Section 550, Title 18 of the United States Code, evidence demonstrating the guilt of the principal offender was admissible against petitioner.

4. In holding that it was necessary under the indictment in the case, to prove the guilt of the principal offender, named in the indictment, as part of the Government's case in chief against petitioner, who was charged in the indictment with "aiding and abetting" the principal.

5. In holding that the denial by the trial Court, of petitioner's motion, made at the close of the Government's case, to exclude from the record, as to petitioner, the evidence in question, was proper, in view of the admissibility of the evidence to establish the commission of the crime by Nosek, an essential element in proof of the charge of aiding, abetting, counselling and procuring the commission of the crime.

6. In failing to hold that the admission of the evidence in question constituted error, sufficiently harmful to defendant to deprive him of the fair and impartial trial to which he was entitled under the law of the land, and to require a reversal of the judgment of the District Court.

7. In failing and refusing to reverse the judgment of the District Court, for the errors in the admission of evidence upon petitioner's trial in said District Court.

8. In treating the aforesaid errors assigned by petitioner with reference to the admission of incompetent and prejudicial evidence in the course of the trial, as if such errors in any way involved the charge or instructions of the Court to the jury at the conclusion of the trial, and as if some question of misdirection of the jury were involved in the question.

SUMMARY OF ARGUMENT.

I.

The purpose of the congress in enacting Section 550 of Title 18 of the United States Code was to abolish the distinction, theretofore obtaining at common law in felonies, between principals, accessories before the fact and joint principals in the second degree, and to permit accessories,—aiders and abettors,—to be tried and punished as principals.

Rooney v. *United States*, 203 Fed. 928.

II.

Under Section 550, Title 18 of the Code, the aider and abettor may be tried before or after the principal, and may be convicted and punished independently of the principal, and may be so convicted even though the principal be actually acquitted.

Hale v. *United States*, 25 Fed. (2d) 430.

III.

It follows, therefore, that the government was not required, upon the trial of petitioner as an aider and abettor of Nosek, as principal, in order to make out a case against petitioner, to prove the guilt of Nosek, the principal.

IV.

The government might, at its option, have caused petitioner to have been indicted as principal, jointly with Nosek. Had it done so, and had petitioner been jointly tried with Nosek, as such principal, evidence of alleged incriminating statements and admissions by Nosek, involving petitioner, made out of the presence of petitioner, would have been wholly inadmissible.

Such statements of Nosek could bind petitioner only if made in circumstances in which petitioner was confronted with them, and having the opportunity to deny them, failed to do so.

V.

Had the government chosen to cause petitioner and Nosek to be indicted as co-conspirators, the evidence in question would not have been admissible against petitioner for the reasons that:

(1) Evidence of statements made by a conspirator out of the presence of a co-conspirator is binding upon such fellow conspirator only if made in furtherance of the common purpose or design of the conspiracy.

(2) Evidence of such statements, not made in furtherance of the objects of the conspiracy, but consisting merely of recitals of past transactions between the conspirators, is not admissible against a co-defendant, absent when such statements are made.

United States v. *Corso*, 100 Fed. (2d) 604.

VI.

Since the evidence in question is admittedly hearsay, and admissible in derogation of the rule against hearsay only in cases where the common law is in force with reference to making proof of the guilt of the principal felon before the alleged aider and abettor can be convicted, and since the statute under which petitioner has been indicted, removed by its terms the necessity for the making of that proof, the evidence in question was inadmissible upon the trial of petitioner.

VII.

When the evidence in question was offered, its admissibility was challenged, on behalf of petitioner, by objections, duly interposed. The trial court ruled adversely to petitioner on these objections as they were made, and disposed of them in total, when, in accordance with the suggestion of the trial court, the objection to the evidence was renewed in writing, at the close of the case for the Government.

The question at issue is not, whether, at the conclusion of the trial, the court correctly instructed the jury as to the law applicable to the case, but whether, in the course of the trial, the court correctly ruled upon the admissibility of evidence.

It follows, therefore, that there is no presumption that the trial court, in charging the jury, reversed, in terms, its uniform course of ruling upon the admissibility of evidence, consistently maintained through the trial, and seriously and deliberately reaffirmed at the close of the case for the Government.

VIII.

It would have been impossible for the trial court, in its charge to the jury, even had it therein reversed its prior rulings with reference to the admissibility of the evidence in question, to have removed from the minds of the jurors the adverse effect, upon petitioner's cause, of the admission in evidence, throughout the trial, of this evidence, without proper limitation.

Where, upon a joint trial of defendants in a criminal case, evidence is received, applicable to one defendant, but not binding upon the other, due protection of the rights of the defendants upon whom the proof in question is not binding, requires that the jury should be expressly cautioned, frequently enough to keep the rule in mind, that they must not consider such evidence as to the defendant not bound by it.

Hendrey v. *United States*, 233 Fed. 5.

IX.

In view of the state of this record, the evidence complained of was highly prejudicial to petitioner, the more so since the only competent proof against him was the dubious evidence given by the complaining witness, Kukovec.

ARGUMENT.

I.

Before the enactment of the statute now described as Section 550, Title 18 of the Code, the common law distinction between principals, accessories before the fact and joint principals in the second degree, obtained in the criminal law of the United States, as to felonies.

At common law, before the aider and abettor,—the accessory before the fact, might be tried and convicted, the principal felon must first be apprehended, tried and convicted.

It followed, therefore, at common law, that upon the trial of one charged with aiding and abetting a felon, a substantive part of the case for the prosecution consisted of proof of the apprehension and conviction of the principal, a principal which was expanded by the earlier decisions so as to require, not merely proof of the conviction of the principal, but proof that the alleged principal actually was such principal, and did in fact commit the felony charged.

By its terms, Section 550 of Title 18 of the Code, expressly abolishes the common law distinction between aider and abettor, accessory before the fact and principals and provides that all may be tried and punished as principals.

In the case of *Rooney* v. *United States,* 203 Fed. 928, the Circuit Court of Appeals for the Ninth Circuit says:

> "The effect of the section under consideration (Section 550, Title 18, U. S. Code) is to abolish the distinction between principals and accessories in offenses defined in the laws of the United States, whether the same be felonies or misdemeanors."
>
> *Rooney* v. *United States,* 203 Fed. at p. 932.

II.

The common law refinements of distinction above referred to have been held by the courts of review of the United States to be so completely discarded, that, in *Hale* v. *United States,* 25 Fed. (2d) 430, a principal and an aider and abettor, or accessory, respectively indicted as such, were placed on trial jointly,—the alleged principal acquitted, the alleged accessory convicted,—and the conviction of the latter was affirmed by the Circuit Court of Appeals.

III.

It therefore follows, that as a matter of law, the Government, having caused petitioner to be indicted, as an aider and abettor, under the very statute which by its terms abolishes the common law distinction between aider and abettor and principal, cannot well maintain that it must upon the joint trial of principal and aider and abettor, prove the guilt of the principal as part of its case against the alleged accessory.

It also follows that the holding of the Circuit Court of Appeals for the Seventh Circuit, in the instant case, to the effect that the evidence complained of by petitioner was admissible against petitioner,

> "* * * to establish the commission of the crime by Nosek (the alleged principal) an essential element in proof of the charge of aiding, abetting, counselling and procuring the commission of the crime."
>
> (Opinion of Circuit Court of Appeals, Seventh Circuit, R. 150).

is in direct conflict with that of the Circuit Court of Appeals for the Ninth Circuit in *Rooney* v. *United States,* 203 Fed.

928, and with that of the Circuit Court of Appeals for the Second Circuit in *Hale* v. *United States*, 25 Fed. (2d) 430.

It is further submitted that counsel for petitioner have been unable to find any case where the question involved here has been decided by this Court.

IV.

It is further submitted, that had the Government so desired, it might have caused the indictment of petitioner as principal, under the provisions of Section 550, Title 18 of the Code, proof of "aiding and abetting" being sufficient, under this statute, to justify petitioner's conviction as such principal.

Had the Government taken this course, the evidence in question would have been clearly inadmissible, as against petitioner. The rule is so well established as to require no citation of authority, that one defendant is bound by the hearsay statements of a co-defendant, tending by their content to incriminate such defendant, and made out of the presence of such defendant, only, upon further proof that, upon being confronted with such statements, and having full opportunity to do so,—such defendant fails to deny the same, or affirmatively admits their truth.

V.

Looking, again, at the question of the admissibility of this evidence from the point of view most favorable to the Government, the latter might have indicted petitioner and Nosek as co-conspirators, or, without so indicting them, it might have contended that the proofs showed, prima facie, the existence of a conspiracy between them, to commit the offense charged in the indictment.

Would the evidence in question then be admissible?

It is submitted that it would not, for the reason that while, upon prima facie proof of the existence of a conspiracy, the acts and declarations of co-conspirators are binding upon and may be proved against others involved in the conspiracy, though done or uttered out of the presence of such others,—yet, to fall within this rule, such acts or declarations must be done or uttered in furtherance of the object of the conspiracy.

Mere recitals of supposed states of fact, involving others, and not in furtherance of the common design, do not come within this rule.

It is further submitted, that in the instant case, the indictment contained no count charging a conspiracy, there was no proof, prima facie, of any common design or purpose between petitioner and Nosek, and if there had been,—the evidence complained of consisted of nothing that could be taken to have been in furtherance of such common design, but on the contrary, consisted merely of recitals by Nosek of past transactions, tending strongly to incriminate petitioner.

VII.

Since, therefore, the statute under which petitioner was indicted, removed the requirement which, at common law would have rendered the evidence in question admissible, namely, proof of the guilt of the principal, since, as we have endeavored to show, the evidence would not have been admissible at all, had petitioner been indicted and tried as principal, jointly, with his co-defendant, or if he had been indicted or tried upon the theory that he and his co-defendant entered into a conspiracy to commit the crime charged in the indictment, it follows, logically, that no ground can be found upon which to base its admission in evidence against petitioner upon his trial.

Surely the Government cannot be heard to say that the Congress, in sweeping away the inconvenience and uncertainty attending upon the prosecution of aiders, abettors and accessories of felons under the common law, by the enactment of Section 550, Title 18, of the Code, intended to preserve an anomalous rule of evidence, to the damage of defendants prosecuted under that section of the Code.

Nor, we submit, is it to be supposed that the law now is that the Government may, by so wording an indictment as to charge a defendant as an "aider and abettor" of a felon, thereby have the benefit of a wholesale abrogation of the fundamental rule against hearsay,—upon the pretext that hearsay is requisite in making proof of facts which have by statute been rendered unnecessary to be proved.

VII.

Granted, for the sake of argument, that the evidence, complained of herein by petitioner was on all grounds, inadmissible.

There remain, in the opinion of the Court below, two answers to petitioner's contentions which, if valid, would bar him from relief in this Court.

The one, (Opinion of Circuit Court of Appeals, R. 150) amounts, in substance, to a contention that since the instructions or charge of the trial Court to the jury are not preserved in the record, it will be presumed that the trial Court correctly instructed the jury as to the law of the case, and that it will therefore be presumed that the trial Court in its charge, reversed its repeated rulings throughout the trial, to the effect that the evidence was admissible as against petitioner, and told the jury that it was not, thereby curing any ill effect that might have come to petitioner's cause as a result of the jury being permitted to hear this proof through the trial and to apply it to petitioner.

The other is the theory, apparent throughout the opinion of the Court, that the evidence in controversy could have had little, if any, ill effect upon petitioner's cause.

It is submitted that this last circumstance is apparent from the fact that the opinion of the majority of the Court in no way particularizes as to the nature of the proof complained of, while the dissenting opinion (R. 152-154) discusses it in detail.

May we, on behalf of petitioner, at the risk of repetition, point out to this Court, that throughout the trial, the question of whether the proofs of which petitioner now complains were admissible, was treated by both Court and counsel, as a question of the admissibility of evidence, item by item, as it was offered on behalf of the Government.

Petitioner nowhere in the course of the trial admitted that for any purpose whatever, could this testimony be admissible as against him, though of course admitting its competency as against his co-defendant, Nosek.

The two men were on trial, together. The jury was, necessarily, required to segregate out of the mass of evidence offered, that which was applicable to each, respectively, and to apply it, where it belonged, under the directions of the Court.

With this thought in mind, counsel for petitioner objected (R. 14) where a somewhat harmless, but incompetent item of hearsay was offered. The Court, without ruling, said that the jury would be properly instructed.

Again, (R. 15) a highly prejudicial statement involving petitioner inferentially in the guilt of Nosek, was attributed by the complaining witness, Kukovec, to Nosek,—all out of the ken of petitioner.

Again, the Court, without ruling on the objection, indicated his intention of dealing with all of counsel's objections to the competency of this hearsay testimony, "at the

conclusion of the evidence." Again, (R. 16) counsel restated the ground of his objection.

Throughout the record, (R. 17, 18-19, 43, 46, 51) counsel for petitioner repeatedly objected to this testimony.

Finally, at the close of the case for the Government, objection was made, in writing to all testimony of conversations had between Nosek, the co-defendant, and others, out of petitioner's presence,—not, on the theory that this evidence was admissible for a limited purpose only as to petitioner, but upon the theory, maintained in this petition,—that it was not admissible at all against petitioner,—that it should be stricken from the record, as to petitioner, and the jury instructed to disregard it,—as to him (R. 125).

The Court (R. 68) after careful consideration, overruled petitioner's motion.

Without unduly lengthening this argument, it is respectfully submitted that, in the words of the dissenting opinion in the Court below, it "does violence to the record" to presume that the Court, at the conclusion of the trial, reversed this considered ruling, and attempted, in a charge to the jury to remove from their minds the effect of item after item of this proof which they had, throughout the trial, been permitted to receive as affecting petitioner.

VIII.

Again, for the sake of argument, only, let it be conceded that after a trial, the length of which may be gathered from the bulk of the Transcript of Record, the Court completely reversed itself, and attempted to advise a jury of laymen that the evidence of statements made by Nosek and conversations had between him, Kukovec, Logue, Dixon and Tobin, out of the presence of petitioner, must

be disregarded by them as to petitioner, and not considered as evidence against him.

Is it reasonable to suppose that a jury of laymen could, with any degree of accuracy, at the very end of the trial, winnow, by means of such direction, the competent from the incompetent?

Can an unobjectionable charge neutralize the unfortunate effect, upon a defendant's cause, of a lengthy series of erroneous rulings on the admissibility of evidence?

Where two defendants are tried together, it necessarily follows that proofs will be elicited against the one, in the course of the trial, which in nowise affect the other.

It would surely not be contended, seriously, that a fair trial could be had, were such proofs admitted indiscriminately, leaving the matter of instructing the jury as to their applicability to the respective defendants, until the last word of the Court is given, in the form of the charge.

On the contrary, illustrative of the rulings of court of review of the United States on that subject, is the case of *Hendrey* v. *United States,* 233 Fed. 5, where the Circuit Court of Appeals said:

> "Clearly, such evidence must be considered only as against the one respondent directly affected. Due protection of the rights of other respondents requires that the jury should be expressly cautioned to this effect, and warned that they must not consider the evidence as affecting other respondents, and that, if it is not practicable to give such caution every time that such evidence is received, it must, at least, be repeated frequently enough to keep the rule in mind."

Hendrey v. *United States,* 233 Fed. 5 at p. 17.

IX.

Petitioner fully recognizes the fact that the trial of a criminal case is not merely a contest of wits in an effort on the part of counsel for defendant to score off errors against the presiding Judge and it is with the firmest conviction that the evidence, the admission whereof we have attempted to show was erroneous, was of grave and vital harm to defendant's cause in the trial Court, that we have insisted that its admission was error both in the Circuit Court of Appeals and in this Court, in this brief.

May we at this point, again call to the attention of the Court, the fact that all of the admittedly competent evidence involving petitioner is compressed in the respective versions of petitioner and the witness, Kukovec of words exchanged between them during the few minutes consumed in the physical examination of Kukovec.

May we also refer again, to the fact that both the majority and the dissenting opinion stigmatize Kukovec's whole testimony as evasive and contradictory.

With this state of the record in mind, may we also show to this Court that under the rulings complained of in this petition the jury was permitted (R. 15) to apply against petitioner, the statement of Nosek attributed to him by Kukovec to the effect that when he first entered Nosek's office the latter greeted him with this statement that he was "Walter Kukovec" and that he "came to see me about a six months' deferment."

If, as petitioner contended he did not talk with Kukovec about a deferment at all, then his whole transaction with Kukovec was innocent. Kukovec, the admittedly contradictory and evasive witness was thus permitted to corroborate his, the guilty version of petitioner's transaction with him, by quoting Nosek with petitioner absent and

with no opportunity for petitioner to deny or rebut Nosek's statement.

If, as the entire Court below seems to agree, this was a very close case on the facts, it might well be that this irregular corroboration of Kukovec's story might have turned the scale in the minds of the jurors against petitioner's version of his talk with Kukovec.

It will also be remembered that admittedly, Nosek and petitioner had been friends for years. Petitioner contended that he sent Kukovec to Nosek with an innocent intent, namely, to procure Nosek to advise him as a lawyer with reference to his mother's plight. Kukovec, on the other hand, contended that he was sent to Nosek by petitioner in order to get a deferment for money.

In this circumstance, the *ex parte* statement of Nosek, related by Kukovec (R. 15-16) that he, Nosek, had "helped about 15 fellows and several of them got drunk * * * and were bragging in the saloon on how they fixed the draft," might again, well have turned the scales in the minds of the jurors and may have led them to the inference that the Kukovec transaction was merely one of a series of similar illicit deals in which it might be inferred from their long standing friendship and mutual business associations, that petitioner played an unlawful part.

Similarly, the repeated statements of Nosek, made out of the presence of petitioner to the arresting officers, Logue, Dixon and Tobin (R. 44, 45, 50, 51 and 60) to the general effect that he, Nosek, had had many chances to make big money and was now "hooked," in view of the admittedly close friendship of Nosek and petitioner and of the admitted facts that whether for good or ill, petitioner did send Kukovec to Nosek, all, when permitted to be considered against petitioner, tended to involve him in the mind of a jury with the almost self evident guilt of Nosek.

The instantaneous admission of Nosek to Logue (R. 44) that he, Nosek, "knew what it was all about," imme-

diately upon his arrest was, of course, like all other admissions of Nosek against interest, binding upon him, but when erroneously permitted to bind petitioner, again tended by inadmissible evidence, to tie petitioner in with Nosek's consciousness of guilt in his dealings with Kukovec.

It is, therefore, submitted that so close was this case upon the facts and so lacking in the appearance of sincerity and straightforwardness was the testimony of the only witness against petitioner upon this trial, that the admission in evidence of these matters here complained of constitutes not merely error, but was of substantial injury to petitioner and deprived him of that fair and impartial trial to which he was entitled under the law of the land.

CONCLUSION.

It is therefore respectfully submitted that petitioner has shown to this Court that the Circuit Court of Appeals for the Seventh Circuit, in deciding petitioner's cause in that Court, has sanctioned on the part of the trial Court a course of procedure at variance with the decisions of Courts of similar jurisdiction in other Circuits of the United States and that the matters raised by this petition are of sufficient gravity to justify this Court in reviewing the decision of the Circuit Court of Appeals to the end that this Court may by its supervisory power remedy the injury complained of by petitioner.

Respectfully submitted,

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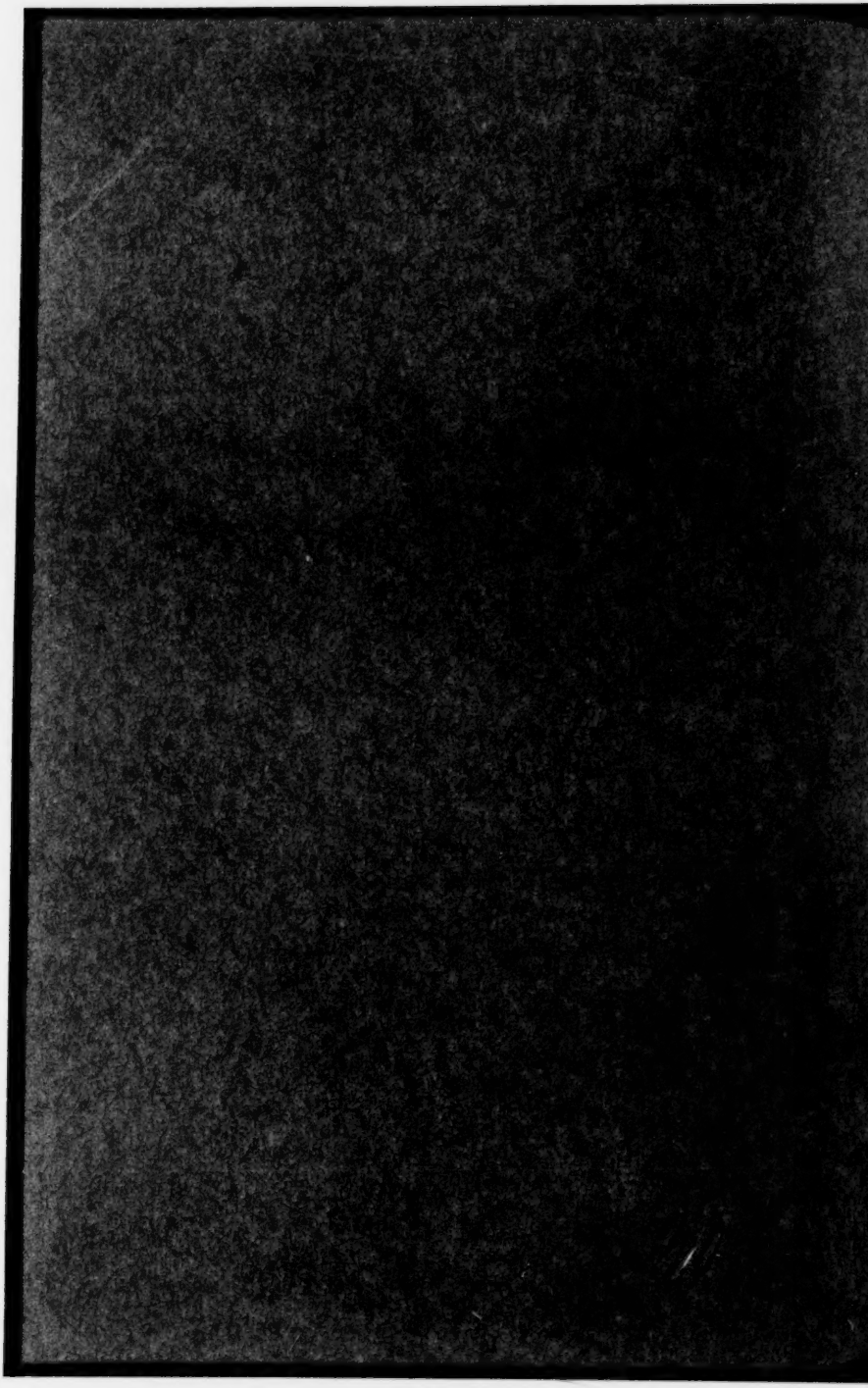

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 956

J. P. GARDZIELEWSKI, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Circuit Court of Appeals (R. 147–154) are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 16, 1942 (R. 155). The petition for a writ of certiorari was filed February 16, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, in the trial of a principal and one charged with aiding and abetting him in the commission of a crime, statements by or to the principal made outside of the presence of the aider and abettor, some of which were made in the course of the conspiracy and the others of which did not tend to incriminate the aider and abettor, are admissible against the latter.

STATUTES INVOLVED

Section 117 of the Criminal Code (18 U. S. C. 207) provides in part:

> Whoever, being an officer of the United States, or a person acting for or on behalf of the United States * * * shall ask, accept, or receive any money * * * with intent to have his decision or action on any question, matter, cause, or proceeding * * * influenced thereby, shall be fined not more than three times the amount of money * * * so asked, accepted, or received, and imprisoned not more than three years; * * *.

Section 332 of the Criminal Code (18 U. S. C. 550) provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

On May 16, 1941, petitioner and Joseph M. Nosek were indicted on two counts in the Northern District of Illinois, the indictment charging that Nosek, who was chairman of a Chicago local selective service draft board, asked, accepted, and received money from one Walter Kukovec, a draft registrant, with intent to have his action and decision on the matter of Kukovec's classification under the Selective Training and Service Act of 1940 influenced thereby. Petitioner, who was the examining physician for the local board of which Nosek was chairman (R. 110), was charged in each count with having aided, abetted, and counselled Nosek in asking, accepting, and receiving the money from Kukovec. (R. 2–4.)

Petitioner's motion for a severance (R. 6–8) was denied (R. 10) and he and Nosek were tried together (R. 13).[1] The pertinent facts relating to the evidence which petitioner claims was improperly admitted over his objections may be summarized as follows:

Kukovec testified that on May 1, 1941, immediately after his physical examination by petitioner, he told petitioner that his mother was in a state hospital and that he was going to ask the local board for a six months' deferment so that he could earn money to leave for her when he enlisted in the

[1] Petitioner does not contend that the trial court erred in denying a severance.

fall (R. 14–15). Petitioner replied, "You don't have to go to the Draft Board, you go over and see Joe Nosek," and told Kukovec that his examination "balanced," that "You go or you don't." After questioning Kukovec regarding his work and income, petitioner asked him whether it was worth $30 to him "to stay out of the army," explaining, "Well, you know it will make the pen write easier." Without waiting for a reply, petitioner called Nosek on the telephone and told him that Kukovec was coming over to see him "about a six months' deferment." (R. 15.) Kukovec went to Nosek's office and, after some preliminary conversation, the latter told him, "If you bring me $35 I will have you put in Class 1–B," a deferred classification for "temporary physical disability" (R. 15–16). Kukovec had no money with him and arranged to meet Nosek that evening (R. 16). Immediately after leaving Nosek's office, Kukovec reported the incident to the War Department, whence he was taken to the central selective service board, the United States Attorney's office, and the Federal Bureau of Investigation (R. 16–17). Kukovec returned to Nosek's office in the evening and paid him $10, promising to return the next day with the balance (R. 17–19). The following day, May 2, Kukovec paid Nosek $25 in three bills which had been marked by agents of the Federal

Bureau of Investigation (R. 19; see also R. 42).[2]

Kukovec was also permitted to testify, over petitioner's objection, that when he arrived at Nosek's office from petitioner's on May 1, he told Nosek, "The doctor sent me," that Nosek replied, "Oh, yes, you are Walter Kukovec, you came to see me about a six months' deferment" (R. 15), and that Nosek stated during this conversation, "I have helped about fifteen fellows and several of them went ahead and got drunk— * * * and were bragging in saloon on how they fixed the draft" (R. 15–16).

Logue, one of the agents who arrested Nosek in the latter's office immediately following Kukovec's payment to him of $25 on May 2 (R. 42–43), testified that Nosek said on that occasion, "Of all the opportunities I have had for big money to think I would get hooked on a little thing like this" (R. 44). Logue also testified that Nosek admitted that he knew what the arrest "was all about" (R. 44), and that Nosek said, "That is what you get for trying to be a good fellow and doing a man a favor" (R. 45). Dixon, another agent (R. 49), and Tobin, a deputy marshal who accompanied the agents (R. 59), also testified that Nosek made such statements at the time of his arrest (R. 50–51, 60). Peti-

[2] Two of these bills were found on Nosek's person by the agents, who entered his office and arrested him immediately after he had received the payment from Kukovec. The third was found in the possession of Nosek's secretary. (R. 19, 43–45, 51–52.)

tioner's objection to this testimony on the ground that the statements were made outside of his presence (R. 43, 51), was overruled (R. 43; see also R. 18–19, 51).

Petitioner and Nosek were convicted (R. 127, 150) and petitioner was sentenced to imprisonment for two years (R. 128). On appeal by petitioner alone, his conviction was affirmed (R. 155). In respect of petitioner's claim of error in the admission of the testimony of Kukovec, Logue, Dixon, and Tobin relating to their conversations with Nosek, the majority of the court below held that in view of the trial judge's statements during the trial that he would instruct the jury at the close of the evidence concerning these conversations, and in the absence of record proof to the contrary, it must be assumed that he correctly charged the jury regarding their consideration of this testimony. The majority also held that the judge properly denied petitioner's motions made during the course of the trial to exclude the testimony, because it was admissible to establish the commission of the crime by Nosek, an essential element in the proof of the charge that petitioner aided and abetted Nosek. (R. 150.) The dissenting judge was of the opinion that the testimony was inadmissible as against petitioner and was prejudicial because the evidence to support petitioner's conviction was not strong, and that, on the record, it could not be presumed that the trial judge correctly instructed the jury concerning it (R. 151–154).

ARGUMENT

Petitioner's sole contention here is that the trial court committed reversible error in admitting the testimony of Kukovec and the officers concerning their conversations with Nosek outside the presence of petitioner (Pet. 5, 11–12, 20–24). We think petitioner's argument is founded upon a misconception of the applicable rules of evidence.

1. The proof clearly pointed to the existence of a conspiracy between Nosek and petitioner (*supra*, pp. 3–5), and Nosek's statements to Kukovec on May 1, 1941, prior to Nosek's arrest, which tended to incriminate petitioner, were in furtherance of that conspiracy. It is settled that if a conspiracy is shown, the declarations of one defendant outside the presence of his co-defendants but in the course of the conspiracy, are admissible against the latter even though a conspiracy is not charged in the indictment.[3]

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[3] *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 249; *Lincoln* v. *Claflin*, 7 Wall. 132, 139; *Lee Dip* v. *United States*, 92 F. (2d) 802, 803 (C. C. A. 9), certiorari denied, 303 U. S. 638; *Coplin* v. *United States*, 88 F. (2d) 652, 660–661 (C. C. A. 9), certiorari denied, 301 U. S. 703; *Cossack* v. *United States*, 82 F. (2d) 214, 216 (C. C. A. 9), certiorari denied, 298 U. S. 654; *Quercia* v. *United States*, 70 F. (2d) 997, 998–999 (C. C. A. 1), reversed on other grounds, 289 U. S. 466; *Friscia* v. *United States*, 63 F. (2d) 977, 981 (C. C. A. 5), certiorari denied, 289 U. S. 762; *Zarate* v. *United States*, 41 F. (2d) 598, 599 (C. C. A. 5), certiorari denied, 282 U. S. 867.

Petitioner's reliance (Pet. 17, 22–23) upon the rule that statements of a conspirator not made in furtherance of the

2. Nosek's admissions to the officers at the time of his arrest on May 2 were clearly admissible to prove his guilt of the crime for which petitioner was jointly tried as an aider and abettor. Admissions and confessions of a principal may be received at the trial of one charged with aiding and abetting for the purpose of establishing the commission of the crime by the principal, and limitations upon the admission of evidence of acts and declarations of conspirators relied upon by petitioner (Pet. 17, 22–23), are not applicable.[4] Of course, if an admission or confession of the principal tends to incriminate the aider and abettor, only that portion of it which tends to establish the guilt of the principal may be admitted (*Hale* v. *United States,* 25 F. (2d) 430, 438 (C. C. A. 8); *State* v. *Lyda,* 129 Wash. 298, 301–305), or the jury must be cautioned that the admission or confession is the principal's alone

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conspiracy but consisting merely of recitals of past transactions between the conspirators are inadmissible against a co-conspirator, is ill founded. Nosek's statements to Kukovec were not of that character, but, on the contrary, were in execution of the conspiracy. The conspiracy was not terminated until the arrest of Nosek and petitioner on May 2.

[4] *Hale* v. *United States*, 25 F. (2d) 430, 438 (C. C. A. 8); *United States* v. *Hartwell*, 26 Fed. Cas. 196, 201–202 (C. C. D. Mass.), affirmed in part and reversed in part on other grounds, 6 Wall. 385; *State* v. *Lyda*, 129 Wash. 298, 300; *State* v. *Mann*, 39 Wash. 144, 151; *Howard* v. *State*, 109 Ga. 137, 140; *Givens* v. *State*, 103 Tenn. 648, 661; *Gibson* v. *State*, 53 Tex. Cr. 349, 363–364; *Mulligan* v. *People*, 68 Colo. 17, 25–26; *State* v. *Mullins*, 95 Kans. 280, 291–295; cf. 4 Wigmore, *Evidence* (3d ed. 1940), sec. 1079.

and may not be considered as against the aider and abettor (*State* v. *Mann,* 39 Wash. 144, 151–153). In the instant case, nothing in the admissions of Nosek made to the arresting officers after the termination of the conspiracy in any way incriminated petitioner. Hence, they were admissible against petitioner in the form in which they were received to prove Nosek's guilt. It follows, therefore, that the trial court properly overruled petitioner's objections to their admission and properly denied his motion to strike the evidence and to instruct the jury that it was "not to be considered at all as against" petitioner (R. 67, 125).[5]

3. Since Kukovec's testimony was admissible as proof of petitioner's guilt, and since the testimony of the officers in no way incriminated him, there was

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[5] Nothing in *Rooney* v. *United States*, 203 Fed. 928 (C. C. A. 9), cited by petitioner (Pet. 20), is inconsistent with these principles. It was there held that the acquittal of the principal is no bar to the conviction of the alleged accessory since an accessory is made a principal by Section 332 of the Criminal Code. But it does not follow that in a trial of the aider and abettor the prosecution is relieved of proving the commission of the crime.

Hendrey v. *United States*, 233 Fed. 5 (C. C. A. 6), also relied on by petitioner (Pet. 27), held that, where evidence is received which is admissible against some of several co-conspirators, but not against others, the jury must be instructed in respect of such evidence. But there the court was speaking of statements made and acts done after the termination of the conspiracy. As we have pointed out, evidence of admissions made by a principal are admissible in a joint trial of the principal and aider and abettor under a distinct rule of evidence.

no occasion for the trial judge specially to instruct the jury regarding its consideration of this evidence. Hence, we need not speculate as to the adequacy of the charge to the jury, a question which concerned both the majority and the dissenting judge below and is argued here by petitioner (Pet. 24–27).

CONCLUSION

The case was correctly decided below, there is no real conflict of decisions, and no question of general importance is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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MARCH 1942.

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